STATE OF MICHIGAN

COURT OF APPEALS

MONA SHORES BOARD OF EDUCATION and MONA SHORES PUBLIC SCHOOLS, Plaintiffs/Counter-Defendants-Appellees/Cross-Appellants	UNPUBLISHED May 24, 2007
v	No. 271592 Muskegon Circuit Court
MONA SHORES TEACHERS EDUCATION ASSOCIATION, MEA/NEA, Defendant/Counter-Plaintiff-Appellant/Cross-Appellee.	LC No. 05-043998-CL

Before: O'Connell, P.J., and Murray and Davis, JJ.

MURRAY, J., (*dissenting*).

The majority holds that, absent an individual coming forward and claiming discrimination under the terms of a collective bargaining agreement, neither party to an agreement can seek declaratory relief as to the legality of part of the agreement. In support of this proposition, the majority cites *Richardson v Welch*, 47 Mich 309; 11 NW 172 (1882). That case, however, deals with a dispute between two private parties to a contract that is not alleged to be in violation of a statute. *Richardson, supra* at 311. As Justice Sharpe has noted in addressing this line of cases, "[t[here is . . . a clear distinction between a contract prohibited by statute, or which is void because against public policy, and a private contract as is here considered." *Leland v Ford*, 245 Mich 599, 621-622; 223 NW 218 (1929) (Sharpe J., dissenting). The present case involves a challenge to certain terms of a public contract as being in violation of a statute, and therefore *Richardson* and its progeny are not applicable. Therefore, the majority errs in concluding that a circuit court of this state cannot consider a properly raised challenge to the legality of a term within it's collective bargaining agreement.

Further support for the school district's ability to seek a judicial determination as to the legality of the terms of the agreement is the fact that we have previously held that such relief is available through declaratory relief. Specifically, this Court has held that a party to a CBA can seek a declaratory judgment regarding the possible illegality of CBA terms in order to guide the party's future conduct. *Kalamazoo Police Supervisors' Assoc v City of Kalamazoo*, 130 Mich App 513, 518-519; 343 NW2d 601 (1983). However, a party to a CBA cannot seek declaratory relief in a circuit court until the party has exhausted all remedies under the CBA, *American*

Federation of State, County and Municipal Employees, AFL-CIO, Michigan Council 25 v Highland Park Board of Education, 214 Mich App 182, 187; 542 NW2d 333 (1995), and cannot seek declaratory relief regarding an issue that has already been decided in arbitration. *Detroit Auto Inter-Insurance Exchange v Sanford*, 141 Mich App 820, 825-826; 369 NW2d 239 (1985).

Here, Mona Shores Schools challenged the terms of the CBA through arbitration before seeking declaratory relief in the circuit court. Furthermore, the arbitrator refused to address the validity of § 2002.1, which left Mona Shores Schools without means to test the validity of the provision before taking future action under the CBA in regard to claims made by Rodriquez and several other grievants. Moreover, Mona Shores Schools could be subject to damages under the ADEA if Mona Shores Schools is found to be in violation of the ADEA. 29 USC § 623; 29 USC § 626(b); *Michigan State Employees Ass'n v Civil Service Com'n*, 177 Mich App 231, 241; 441 NW2d 423 (1989). Therefore, Mona Shores Schools properly sought a declaratory judgment regarding the legality of § 2002.1 of the CBA as there was an actual controversy between the parties as to the legality of at least § 2002.1 of the CBA. *Highland Park Board of Education, supra* at 187; *Sanford, supra* at 825-826; *City of Kalamazoo, supra* at 518-519.

In my view, then, we must address the substantive issues raised by the parties.[1]

I. Standard of Review

A. In General

An appellate court reviews a trial court's decision on a motion for summary disposition de novo to determine if the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Questions of law, including the proper interpretation of a contract, are also reviewed de novo. *Wold Architects & Engineers v Strat*, 474 Mich 223, 229; 713 NW2d 750 (2006); *Archambo v Lawyers Title Ins Corp*, 466 Mich 402, 408; 646 NW2d 170 (2002).

Both parties challenge the trial court's summary disposition ruling with respect to the arbitration award. Because the parties' motions were based on matters outside the pleadings, we review the motions under MCR 2.116(C)(10). *Spiek v Dep't of Transportation*, 456 Mich 331, 338; 572 NW2d 201 (1998). A motion under MCR 2.116(C)(10) tests the factual sufficiency of a claim. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Summary disposition

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[1] The trial court also properly held that the Michigan Employment Relations Commission did not have exclusive jurisdiction over the parties' dispute. Although the MERC has exclusive jurisdiction to determine unfair labor practices charges, see *Lamphere Schools v Lamphere Federation of Teachers*, 400 Mich 104, 118; 252 NW2d 818 (1977), contractual and statutory claims generally involve different legal and factual issues to be decided in different forums. *Bay City School Dist v Bay City Ed Ass'n, Inc*, 425 Mich 426, 430; 390 NW2d 159 (1986). Because the issue of whether the ADEA invalidated part of the CBA is a legal issue not particularly within the scope of MERC's expertise, the trial court was not precluded from deciding this issue. *Robers v Wayne County*, 176 Mich App 192, 197; 439 NW2d 331 (1989).

is appropriate if the submitted evidence, viewed in a light most favorable to the nonmoving party, fails to establish a genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.* at 120.

B. In a Challenge To a Labor Arbitration Award

When a party challenges an arbitration award, a court's standard of review depends on whether the arbitration arises from statute or the common law. *City of Ferndale v Florence Cement Co*, 269 Mich App 452, 460; 712 NW2d 522 (2006). Here, we are dealing with statutory arbitration, in that MCL 423.9d governs the arbitration of labor disputes. *Sheriff of Lenawee County v Police Officers' Labor Council*, 239 Mich App 111, 118; 607 NW2d 742 (1999), citing *Lincoln Park v Lincoln Park Police Officers Ass'n*, 176 Mich App 1, 4; 438 NW2d 875 (1989), set forth the limited review of labor arbitration decisions that we must employ:

> The necessary inquiry for this Court's determination is whether the award was beyond the contractual authority of the arbitrator. Labor arbitration is a product of contract and an arbitrator's authority to resolve a dispute arising out of the appropriate interpretation of a collective bargaining agreement is derived exclusively from the contractual agreement of the parties. *Port Huron Area School Dist v Port Huron Ed Ass'n*, 426 Mich 143; 393 NW2d 811 (1986). It is well settled that judicial review of an arbitrator's decision is limited. A court may not review an arbitrator's factual findings or decision on the merits. *Port Huron, supra*. Rather, a court may only decide whether the arbitrator's award "draws its essence" from the contract. If the arbitrator in granting the award did not disregard the terms of his employment and the scope of his authority as expressly circumscribed in the contract, judicial review effectively ceases.

II. Analysis

A. § 2002.1 and the ADEA

Having found no jurisdictional impediment to the trial court's proceedings, the next issue to address is the parties' arguments concerning the validity of the cash incentives paid to retirees under § 2002.1. Section 2002.1 is the first of several benefits labeled "Social Security supplement benefits." Unlike the qualifications for retirement in § 2001, which permits any teacher at the top of the salary schedule to retire, § 2002.1 provides for supplemental benefits to retirees based solely on the age of the teacher at the time of retirement. Initial payments range from $5,000 (58 years of age or less) to $4,000 (59 to 61 years of age) to $3,000 (62 to 64 years of age). Retirees are entitled to quarterly payments in a similar fashion, such that teachers retiring at age 58 or less receive the largest quarterly payment. Section 2002.1 does not provide for any payments for teachers who retire at or after age 65. Further, the termination of benefits is addressed in § 2005, which states:

> These benefits shall terminate the month the teacher attains the age of sixty-five (65) years, becomes eligible for Social Security benefits, dies, or ten (10) years after the receipt of the initial cash payment, whichever occurs first.

The trial court correctly held that the benefit provided to retirees under §2002.1 is unlawful under the ADEA.

Under 29 USC 623(a), an employer is prohibited from discriminating against an individual with respect to "compensation, terms, conditions, or privileges of employment, because of such individual's age."[2] In *EEOC v Jefferson Co Sheriff's Dep't*, 467 F3d 571 (CA 6, 2006), an en banc panel of the Sixth Circuit Court recently joined a number of other federal circuits in holding that a prima facie case of disparate treatment discrimination under the ADEA requires no evidence of discriminatory animus against older people if the discriminatory intent is directly evident from the face of an employment benefit plan.[3] Although an employer has no duty to offer early retirement incentives, once the employer elects to do so it must make those benefits available on nondiscriminatory terms, just as it must with any other fringe benefit. *Karlen v City of Colleges of Chicago*, 837 F2d 314, 318 (CA 7, 1988).

Here, as previously discussed, § 2002.1 provides for an initial lump sum payment and quarterly payments to retirees based solely on the age of the teacher at the time of retirement, with teachers who retire at a younger age (58 or less) receiving larger sums of money than those who retire between the ages of 59 and 64. Therefore, although the early retirement incentive plan is voluntary, teachers who retire at a younger age are treated more favorably than those who retire at an older age, based not on years of service or some other nondiscriminatory factor, but solely on their age at retirement, and thus, older teachers who choose to exercise their early retirement option are discriminated against because of their age. Furthermore, teachers who chose to retire at an age of 65 or higher, receive no incentive to retire. The "carrot" of early retirement incentives cannot be extended based solely on the age of the retiree. Accordingly, § 2002.1 is facially invalid. See *Solon v. Gary Community School Corp*, 180 F3d 844, 852-855 (CA 7, 1999) (holding that an early retirement incentive plan allowing employees who retire at age 58 to receive four years of incentive payments, while only allowing two years of incentive payments to employees who retire at age 60, and no incentive payments to employees that retire at the age of 62 or higher, was discriminatory on its face).

Further, the Mona Shores TEA has failed to substantiate its position that § 2002.1 is lawful under 29 USC 623(f) or (l). 29 USC 623(l)(A)(ii)(II) provides that subsection 29 USC 623(a) is not violated solely because an employee pension benefit plan provides for "social security supplements for plan participants that commence before the age and terminate at the age

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[2] Pursuant to 29 USC 630(l), "[t]he term 'compensation, terms, conditions, or privileges of employment' encompasses all employee benefits, including such benefits provided pursuant to a bona fide employee benefit plan."

[3] Because the Sixth Circuit overruled its prior decision in *Lyon v Ohio Ed Ass'n & Professional Staff Union*, 53 F3d 135 (CA 6, 1995), which required a plaintiff to produce additional evidence of discriminatory animus, the Mona Shores TEA's reliance on *Lyon* is misplaced. At most, the reasoning in *Lyon* is helpful in that it recognizes that the very purpose of offering an early retirement incentive plan is to "buy out" expensive workers by accelerating the pension process and that a higher benefit might be required to "buy out" a worker who has more to lose. *Id.* at 139.

(specified by the plan) when participants are eligible to receive reduced or unreduced old-age insurance benefits under title II of the Social Security Act (42 USC 401 et seq.), and that do not exceed such old-age insurance benefits."[4]

The type of payment falling with subsection (l)(A)(ii)(II) must be linked to a "defined benefit plan" and serve to bridge the gap between the employee's age and the age at which the employee becomes eligible for reduced or unreduced social security benefits. *Solon v Gary Community School Corp*, 180 F3d 844, 854 (CA 7, 1999). Here, the Mona Shores TEA has not adequately established that § 2002.1 merely reduces benefit payments based on eligibility to receive old-age insurance under the Social Security Act, as it is also unclear how the cash payments are linked to expected social security benefits. Quite simply, the periodic payments appear to be nothing more than amounts paid on a sliding scale to those persons who have retired, with the amounts being solely dependent on a retiree's age. This is unlawful under the ADEA, unless specifically authorized by another section of the statute.

29 USC 623(f)(2)(B)(ii) is one such section, as it provides that it shall not be unlawful for an employer or labor organization to observe terms of a bona fide employee benefit plan that is a "voluntary early retirement incentive plan consistent with the relevant purpose or purposes" of the ADEA.[5] The trial court's determination that § 2002.1 does not fall within the safe harbor of 29 USC 623(f)(2)(B)(ii), because the evidence indicated that § 2002.1 discriminates solely on the basis of age, was correct. "Arbitrary age discrimination occurs when an employer denies or reduces benefits based *solely* on an employee's age." *Jankovitz v Des Moines Independent School Dist*, 421 F3d 649, 654 (CA 8, 2005) (emphasis in original); see also *EEOC v Hickman Mills Consolidated School Dist No 1*, 99 F Supp 2d 1070 (WD Mo, 2000).

B. Enjoining § 2002.1

An injunction is an extraordinary remedy that is granted only where justice requires it, there is an inadequate remedy at law, and there exists a real and imminent danger of irreparable harm. *Higgins Lake Prop Owners Ass'n v Gerrish Twp*, 255 Mich App 83, 106; 662 NW2d 387 (2003). A trial court's grant of injunctive relief is reviewed for an abuse of discretion. *Michigan Coalition of State Employees Union v Civil Service Comm*, 465 Mich 212, 217; 634 NW2d 692 (2001). See also *Holly Twp v Dep't of Natural Resources*, 440 Mich 891; 487 NW2d 753 (1992), and *Nicholas v Meridian Charter Twp Bd*, 239 Mich App 525, 534; 609 NW2d 574 (2000) (reviewing injunctive relief for an abuse of discretion). Because the trial court correctly

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[4] The amended statute, which does not impact this case, adds specific provisions applicable to local educational agencies and education associations

[5] Mona Shores Schools' argument that the Mona Shores TEA was required to plead this statutory provision as an affirmative defense to the claim for declaratory and injunctive relief is without merit. First, the argument is not well developed. Second, the question of waiver is not dispositive of this appeal because affirmative defenses may be amended. See MCR 2.116(I)(5) and MCR 2.119(F)(3). Therefore, the trial court appropriately considered the merits of the Mona Shores TEA's position regarding subsection (f)(2)(B)(ii).

held that § 2002.1 violated the ADEA, the trial court properly enjoined enforcement of the unlawful provision.

The Mona Shores TEA's reliance on the unclean hands doctrine to preclude injunctive relief is misplaced. The unclean hands doctrine is a self-imposed doctrine that forecloses equitable relief to one tainted with inequitableness or bad faith relative to the matter upon which relief is sought. *Stachnik v Winkel*, 394 Mich 375, 382; 230 NW2d 529 (1975); see also *Rose v Nat'l Auction Group, Inc*, 466 Mich 453, 463; 646 NW2d 455 (2002). Because the matter before the trial court involved an illegal contract provision, the propriety of any relief was dependent on the enforceability of the illegal provision. Under the doctrine of "pari delicto," courts often leave parties as they find them when they enter into an illegal contract if it can be shown that the parties purposely drafted an illegal contract (or contract provision) with the intent to benefit themselves. *Jones v Chennault*, 323 Mich 261, 267; 35 NW2d 256 (1948). Recognized exceptions to this general rule include circumstances "(1) where forfeiture would disproportionately affect a party whose conduct does not warrant such a harsh result, (2) where a claimant may be excusably ignorant of facts that the other party is not, or (3) where the parties are not equally wrong." *Rose, supra* at 471-472, citing Farnsworth, Contracts, § 5.9, pp 76-78; see also *William's Delight Corp v Harris*, 87 Mich App 202, 211; 273 NW2d 911 (1978). Further, a contract term may be unenforceable if legislation provides that it is unenforceable or if the "the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms." See Restatement of Contracts, 2d, § 178.

Mona Shores TEA incorrectly argues that § 2002.1 should continue to be enforced, notwithstanding its illegality. Both parties were at fault for agreeing to a discriminatory retirement incentive provision, but no evidence has been presented that the parties purposely drafted an illegal provision with the intent to benefit themselves, which is evidenced by § 1503 of their CBA, which expressly contemplates that an unlawful provision will be "null and void except to the extent permitted by law." And while the Mona Shores TEA offered evidence that there were seven new retirees in 2004 and that 37 existing retirees receive some type of retirement benefits, the Mona Shores TEA offered no evidence regarding their individual circumstances. Therefore, the trial court's decision to enjoin the Mona Shores TEA from enforcing the illegal contract provision should be enforced.[6]

There is partial merit to Mona Shores Schools' claim that the trial court erred by not declaring the benefit provisions in §§ 2002.2, 2003.1, 2003.2, and the termination-of-benefits provision in § 2005 of the CBA, unlawful under the ADEA. The benefit provisions (§ 2002.2, 2003.1 and 2003.2) are lawful and are distinguishable from § 2002.1 because, on their face, they do not contain age distinctions. Section 2002.2 provides that a teacher electing to retire may be

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[6] Because the injunctive relief ordered by the trial court was not dependent on Mona Shores Schools being an aggrieved person under the ADEA, 29 USC 626(c)(1), we decline to consider the Mona Shores TEA's argument that Mona Shores Schools lacked standing to bring a civil action under the ADEA. *B P 7 v Bureau of State Lottery*, 231 Mich App 356, 359; 586 NW2d 117 (1998).

compensated for sick days, while §§ 2003.1 and 2003.2 establish healthcare benefits for retirees, regardless of age.

Only the termination-of-benefits provision in § 2005 uses age to determine a retiree's eligibility for benefits, and a retiree's age is not linked to the retiree's eligibility for Medicare. The only event triggering termination is the retiree's age. Further, from its terms and its placement in article 2000, it is clear that the parties intended that § 2005 apply to all of the preceding listed retirement benefits in article 2005. Had the parties intended different termination events for different benefits, the parties would not have provided for the first of the listed termination events to be controlling. As a general principle of contract law, an unambiguous contract is enforced as written unless it is contrary to law. *Rory v Continental Ins Co*, 473 Mich 457, 491; 703 NW2d 23 (2005).

Because age alone serves as the termination event, the trial court erred in failing to declare that this termination event in § 2005 is invalid and unenforceable. However, the illegality of part of § 2005 does not render the entire retirement benefits plan invalid, given the severance clause in § 1503 and the existence of other termination events. *Samuel D Begola Services, Inc, supra* at 641.

C. Vacating the Entire Arbitration Award

The Mona Shores TEA is correct in arguing that the trial court erred in vacating the entire arbitration award based on its determination that a single benefits provision in article 2000 of the CBA was invalid. It is apparent from the face of the arbitrator's opinion and award that the arbitrator decided two distinct matters: (1) whether Rodriquez was qualified for early retirement under the terms of the CBA, and (2) whether the CBA required a decision concerning the validity of specific benefits granted to retirees who qualify for early retirement. Whether specific benefit provisions were unlawful had no bearing on whether Rodriquez was qualified for early retirement, but only on whether Mona Shores Schools would be bound to comply with the arbitrator's direction in the arbitration award that it pay benefits to Rodriquez in accordance with article 2000.

In light of this, the trial court erred by vacating the entire arbitration award based on its determination that a single benefits provision was unlawful. At most, having found § 2002.1 invalid and unenforceable, the trial court should have vacated only that part of the arbitration award that required Mona Shores Schools to pay benefits to Rodriquez under § 2002.1.

Mona Shores Schools' errs in arguing that the arbitrator exceeded his authority when concluding that Rodriquez was qualified for early retirement.[7] In labor arbitration, an arbitrator

[7] Although our review is ordinarily limited to issues actually decided by the trial court, *Allen v Keating*, 205 Mich App 560, 564-565; 517 NW2d 830 (1994), we may overlook preservation requirements to (1) prevent manifest injustice, (2) to consider an issue that is necessary to a proper determination of the case, or (3) to consider a question of law for which the necessary facts have been presented. *Steward v Panek*, 251 Mich App 546, 554; 652 NW2d 232 (2002). Mona Shores Schools' has presented an issue of law.

may look for guidance from many sources, but the essence of the award must draw from the CBA. *Port Huron Area School Dist, supra* at 152; *Roseville Community School Dist v Roseville Federation of Teachers,* 137 Mich App 118, 123; 357 NW2d 829 (1984). The award should be upheld so long as the arbitrator does not disregard or modify plain and unambiguous provisions in a CBA. *Police Officers Ass'n of Michigan, supra* at 343.

Section 1203.5 of the CBA provides that a grievance subject to arbitration "shall relate solely to the application and interpretation of the terms of the [CBA]." Here, the arbitrator's decision was based on his interpretation of several provisions of the CBA, as well as his general understanding of the procedures under the TTA. Because the arbitrator's interpretation and application of the CBA and the TTA relates to the merits of the parties' dispute, it is not subject to judicial review. *Port Huron Area School Dist, supra* at 150. Therefore, I would reverse the trial court's order of summary disposition to the extent that it vacated the arbitrator's determination that Rodriquez was qualified for early retirement under the CBA. The arbitrator did not exceed his authority in resolving this issue. Instead, the arbitrator applied the facts of this case to his reading of the CBA.[8]

/s/ Christopher M. Murray

[8] Because of the injustice and inequity that could result from this determination, I would also hold that a decision regarding the illegality of § 2002.1 has a limited prospective effect applying only to this grievant and all future grievants. To hold otherwise could result in serious injustices to possible grievants who retired early in reliance on the aforementioned early retirement incentive benefit terminology in the parties CBA. Indeed, there are an unknown number of retirees who have opted for an early retirement and who are receiving the benefits provided for under § 2002.1. Their reliance on the previously presumed validity of the section is a factor in favor of prospective effect. See *Pohutski v City of Allen Park*, 465 Mich 675, 697; 641 NW2d 219 (2002); *Apsey v Memorial Hospital*, 266 Mich App 666, 679-680; 702 NW2d 870 (2005), rev'd on other grds, 477 Mich 120 (2007) (holding that its decision would be applied prospectively because to apply the decision retroactively would "result in the dismissal of a large number of otherwise meritorious medical malpractice claims," resulting in serious injustice to the vast portion of the medical malpractice legal community who had been relying on the more relaxed URRA out of state notarial act requirements).